

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. _____

76-1253

MELVIN KAPLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	11
 APPENDIX:	
A—Judgment of the United States Court of Appeals for the Third Circuit	1a
B—Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit	4a
C—Relevant Statutes	6a

Cases Cited

Cave v. United States, 159 F.2d 464 (8th Cir. 1947) cert. den. 331 US 847 (1947)	7
Neuberger v. United States, 311 US 83 (1940).....	10
United States v. Ehrlich, 104 F. Supp. 223 (E. D. Pa. 1952)	7
United States v. Habig, 390 US 222 (1968)	3-7, 9, 10
United States v. Scharton, 285 US 518 (1932)	10

	PAGE
United States v. Silverman, 449 F.2d 1341 (2nd Cir. 1971), cert. den. 405 US 918 (1972)	4
United States v. Zudick, 523 F.2d 848 (3rd Cir. 1975)	4

Statutes Cited

Internal Revenue Code (1939):

Sec. 3748	4, 7-11
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Internal Revenue Code (1954):

Sec. 6511	5
Sec. 6511(a)	5
Sec. 6511(b)	5
Sec. 6511(c)	5
Sec. 6511(d)	5
Sec. 6511(e)	5
Sec. 6511(f)	5
Ch. 42	5
Sec. 6513	2, 5-7, 9, 10
Sec. 6513(a)	6, 9
Sec. 6531	2, 4-7, 9, 10
Sec. 7203	9
Sec. 7206	3
Sec. 7206(1)	2, 3, 7, 10

28 U.S.C.:

Sec. 1254(1)	2
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Other Authorities Cited

	PAGE
H.R. Rep. No. 1337, 83d Cong., 2d Sess. A416	7
S. Rep. No. 1622, 83d Cong., 2d Sess. 587	7

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No.

MELVIN KAPLAN,
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vs.

UNITED STATES OF AMERICA,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 18, 1977.

Opinions Below

The Judgment Order of the Court of Appeals for the Third Circuit is not officially reported. There was no

opinion of the United States District Court for the District of New Jersey.

Jurisdiction

The Judgment Order of the United States Court of Appeals for the Third Circuit was made and entered on January 18, 1977 and a copy thereof is appended to this Petition. A Petition for Rehearing before the original panel was filed on January 26, 1977. The Order of the Court of Appeals for the Third Circuit denying the Petition for Rehearing was entered on February 11, 1977. A copy is appended to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the filing of a United States Individual Income Tax Return for the calendar year 1969 in March of 1970 may be timely prosecuted under §7206(1) of the Internal Revenue Code by an indictment returned on April 13, 1976 in view of the six year Statute of Limitations prescribed by §6531 of the Internal Revenue Code?

Statutes Involved

(Pertinent Parts Set Forth in Appendix)

Section 6531—Periods of limitation on criminal prosecutions.

Section 6513—Time return deemed filed and tax considered
(a) paid early return or advance payment of tax.—

Section 7206—Fraud and false statements.

(1) Declaration under penalties of perjury.—

Statement

This appeal arises out of a one count indictment returned by the United States Grand Jury sitting in Newark, New Jersey on April 13, 1976. In the indictment the Petitioner was charged with a violation of §7206(1) of the Internal Revenue Code as regards his 1969 United States Individual Income Tax Return, which return was filed during the week of March 18, 1970.

Prior to the trial before the United States District Court in the District of New Jersey, the Petitioner moved to dismiss the indictment on the grounds that the Statute of Limitations had expired with respect to the alleged offense. This motion was denied.

The facts concerning the date of filing and the date of indictment are stipulated and of record.

After a jury trial, the Petitioner was found guilty on this one count indictment and sentenced on July 14, 1976. A timely Notice of Appeal was filed with the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgment below on January 18, 1977 and denied^a a Petition for a Rehearing on February 11, 1977.

Reasons for Granting the Writ

United States v. Habig, 390 US 222 (1968), held that the Statute of Limitations for criminal violations of the

Internal Revenue Code runs from the actual date of filing and not from the due date when a return is filed after the due date pursuant to an extension. The question presented in this Petition is whether the limitations period runs from the filing date or the due date when a return is filed *before* the due date.

United States v. Zudick, 523 F.2d 848 (3rd Cir. 1975), is a case directly on point. It decided that the Statute ran from the due date. The Third Circuit in this matter was undoubtedly constrained to follow *Zudick* and *United States v. Silverman*, 449 F.2d 1341, 1346 (2nd Cir. 1971), *cert. den.* 405 US 918 (1972).

Habig does opine that if a taxpayer anticipates the April 15 filing date by filing early, the six year limitations period for prosecution under §6531 commences to run on April 15. *Id.*, 390 US at 225. This language is in *Habig* despite the fact that the Court was not called upon to deal with the question of an early filed return. There is no Supreme Court decision on this point. The issue involves one of major importance in the administration of the Internal Revenue laws and in the interpretation of Congressional intent.

Cases decided under the 1939 Internal Revenue Code (§3748) support the position of the Petitioner. There is nothing in the language of §6531 of the 1954 Code or in the Congressional Reports which reflects a desire to change the 1939 Code. On the contrary, where certain other changes from existing law were sought, they were expressly included in §6531.

In short, the *Habig* decision has left an unfortunate ambiguity hanging over the administration of the criminal

provisions of the Internal Revenue Code. Petitioner feels that such an ambiguity should be resolved.

To expand upon these assertions, §6531 of the Internal Revenue Code prescribes a six year Statute of Limitations for most criminal violations of the Internal Revenue Code including the one herein involved. The indictment was filed more than 6 years after filing. On its face, therefore, the indictment would appear to be time barred.

The exception relied upon by the Government is contained in the last sentence of §6531 which states "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of §6513 shall be applicable." One must, therefore, refer to section 6513 which has only one possible reference to an early filed return. It is contained in the first sentence of subsection (a) which states "[f]or purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day." (Emphasis supplied). There is no other possible provision in §6513 which could be considered in this matter.

This would then require a second cross-reference to §6511 which is a statute entitled "LIMITATIONS OF CREDIT OR REFUND." It deals with the Period of Limitations on Filing Claim (subsection a); Limitation on Allowance of Credits and Refunds (subsection b); Special Rules Applicable in Case of Extension of Time by Agreement (subsection c); Special Rules Applicable to Bad Debts and Operating Loss Carrybacks (subsection d); Special Rules in Case of Manufactured Sugar (subsection e) and Special Rules for Chapter 42 Taxes (subsection f) . . . (Chapter 42 deals with excise taxes on private foundations). All subsections seem inapplicable.

Using §6513 as a springboard, therefore, we have seemingly irrelevant matter referred to us when we analyze the question of when an *early* return is deemed filed for criminal purposes. But let us look at what this reference to §6513 offers us when we consider a *late* filed return. Specifically, the third sentence in §6513(a) says: "For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined *without regard to any extension of time* granted the taxpayer and without regard to any election to pay the tax in installments." (Emphasis supplied). This does not appear ambiguous. There is no need in this instance to consult the seemingly irrelevant §6511. Nonetheless, and for valid reasons stated therein, *Habig* was able to surmount this rather clear language and find that if a return is filed late, for criminal purposes the actual filing date is to be considered rather than the due date (disregarding extensions). The Court, therefore, found that the last sentence of §6531 is not mandatory in the case of a late filed return. One need not refer to §6513 to determine periods of limitation in such an instance.

The aforementioned dictum of *Habig* does speculate that the reference to §6513 was meant to deal only with *early* returns (*Id.*, 390 US at 225). Mr. Justice Fortas believed that the effect of the reference to §6513 in §6531 was to give the Government the administrative assistance, for purposes of its criminal tax investigation, of a uniform expiration date for most taxpayers, despite variations in the dates of actual filing. *Ibid.* 225-226.

Petitioner most respectfully suggests that the Court assumed more than Congress intended when it offered such views. There appears to be little doubt that this was not the law prior to the 1954 Code. The Statute of Limitations on an early filed return ran from the actual date of

filing rather than a later due date under the 1939 Code. *Cave v. United States*, 159 F. 2d 464 (8th Cir. 1947) *cert. den.* 331 US 847 (1947); *United States v. Ehrlich*, 104 F. Supp. 223 (E. D. Pa. 1952); §3748 of the 1939 Internal Revenue Code.

We, therefore, must inquire as to whether Congress intended to, and did in fact, change the 1939 Code when it adopted the 1954 Code provisions. If not, the prior decisional interpretations would seem still viable. (*Habig* does not cite them).

The Congressional Reports offer little with regard to §6531. It does refer to the fact that §6513 of the 1954 Code "embodied the existing law as to early returns . . ." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A416; S. Rep. No 1622, 83d Cong., 2d Sess. 587. Here is some expression of continuity. If we had such language describing §6531, then no problem would exist and the Petitioner's position would be demonstrably correct.

There are certain significant changes in the actual language of §6531 as compared to its 1939 counterpart, §3748. Petitioner believes that by a comparison of the two statutes a clear Congressional intent surfaces as to just what changes were intended.

The most obvious change is that the crime proscribed by the predecessor of §7206(1) was indictable within 3 years under the 1939 Code and 6 years under the 1954 Code.

A second major difference occurs. The 1939 provision states that "[t]he time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings." The 1954 Code states

"[t]he time during which the person committing any of the various offenses arise under the internal revenue laws is outside the United States or is a fugitive of justice within the meaning of §3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings."

This constitutes a major change. Under the 1939 Code the Statute was tolled when the person was merely outside the district. Under the 1954 Code the Statute is tolled only when the person is outside the United States. Significantly, the 1954 Code then contains a parenthetical sentence following this statute tolling provision:

(The preceding sentence shall also be deemed an amendment to Section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title).

This is a specific and conscious effort by Congress to cover a situation in which the Statute of Limitations under the 1939 Code was to be changed. It deals with the difficulties created by extending the statute on certain crimes from 3 years to 6 years.

The third change concerns the ability of the Government to extend the Statute by the filing of a complaint before a Commissioner of the United States prior to the expiration of the period. The 1939 provision states: "Where a complaint is instituted before a Commissioner of the United States within the period the time shall be extended until the discharge of the grand jury at its next session within the district." The 1954 Code's comparable provision states: "Where a complaint is instituted before a commissioner [now a magistrate] of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States."

The final change of any note is the last sentence tacked on to the 1954 Code section. It is the one which calls into play §6513 for interpretive purposes. No such provision exists in the 1939 Code.

These are the four specific, significant, and literal changes.

The fourth change embodying the reference to §6513 has been somewhat diluted already by *Habig* with regard to a *late* filed return. If Petitioner is correct in stating that it does not apply to an early filed return either, then what is the effect of the last sentence of §6531? We cannot assume that Congress intended a meaningless act. In reading §6513, we can perceive some more obvious applications which were undoubtedly intended. For example, the last sentence of §6513(a), which deals with late filed returns, also talks about the time a tax shall be required to be paid. It states that the last day prescribed for paying the tax shall be determined without regard to extensions of time. In a prosecution for willful failure to pay the tax under §7203, we would have no document on file

with the Government and, consequently, some difficulty could arise in determining the date on which the offense is committed, particularly in the case of a person who secures an extension of time and still does not file a return or pay the tax. It is clear that the last sentence of §6531 would cover such an offense and would not permit a scheming non-filer to shorten the period of his vulnerability by deviously securing an extension of time of as much as 6 months. This can be the only instance in which the reference to §6513 would make any sense, (accepting the Court's reasoning in *Habig* regarding late filed returns). The disputed language could not logically refer to early returns.

Petitioner offers yet another basis for attacking the Government's interpretation. It is that the offense for which the Petitioner was charged (§7206(1)) is the equivalent of perjury. The Statute permits prosecution, for example, for the filing of false documents or papers as well as returns. It is not limited to tax returns. Accepting the fact that the offense is the equivalent of perjury, does it not seem incongruous to talk of "early" perjury and "late" perjury, particularly when the prosecution is for false documents other than returns?

By way of summation, where the 1954 Internal Revenue Code has specific literal changes from the 1939 Code, should not the rule *expressio unius est exclusio alterius* imply that nothing more was intended. cf. *Neuberger v. United States*, 311 US 83 (1940).

As a guiding principle in resolving these Statute of Limitation questions in criminal matters, it is submitted that these problems should be liberally construed in favor of repose. *United States v. Scharton*, 285 US 518 (1932).

These rules of statutory construction are useful if the language to be construed is ambiguous or imprecise and

legislative intent is not apparent. While the language does suffer from the typical revenue code malady of prolixity, the intent of Congress seems clear enough (though not as clear as one would like) by virtue of the failure to specifically change the 1939 Code, as interpreted by the courts.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

**Judgment of the United States Court of Appeals
for the Third Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 76-1999

UNITED STATES OF AMERICA

vs.

MELVIN KAPLAN

Appellant

(D.C. Crim. No. 76-149)

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Argued January 14, 1977

**Before GIBBONS and GARTH, *Circuit Judges*, and BECHTLE*,
*District Judge***

*** Louis C. Bechtle, United States District Judge for the Eastern
District of Pennsylvania, sitting by designation.**

[1a]

2a

Appendix A

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JUDGMENT ORDER

In this appeal from a judgment of sentence following a verdict of guilty of violation of 26 U.S.C. § 7206, defendant contends that (1) that there was insufficient evidence to support the verdict; (2) that the court erred in its supplemental instructions; and (3) that the prosecution was time barred. We find no error.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,
JOHN J. GIBBONS
Circuit Judge

Attest

THOMAS F. QUINN

Dated: Jan. 18, 1977

Clerk

3a

Appendix A

Certified as a true copy and issued in lieu
of a formal mandate on February 23, 1977.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, U. S. Court of
Appeals for the Third Circuit

APPENDIX B**Order Denying Petition for Rehearing of the United States
Court of Appeals for the Third Circuit****UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 76-1999

UNITED STATES OF AMERICA

vs.

MELVIN KAPLAN

Appellant

(D.C. Crim. No. 76-149)

Before GIBBONS and GARTH, *Circuit Judges*, and BECHTLE*,
*District Judge***ORDER**Upon the consideration of the petition for rehearing
by appellant before the original panel,

* Sitting by designation.*Appendix B*It is ORDERED that the petition for rehearing before the
original panel is denied.

By the Court,

JOHN J. GIBBONS
Circuit Judge

Attest

THOMAS F. QUINN, Clerk

Dated: February 11, 1977

APPENDIX C

Relevant Statutes

Internal Revenue Code of 1954 (Title 26 U.S.C.A.):

Section 6531—PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years— . . .

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents) . . . The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than three (3) years after the date of enactment of this title, and except that period shall not, with the application of such amend-

Appendix C

ment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

Section 6513—TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID

(a) EARLY RETURN OR ADVANCE PAYMENT OF TAX.

For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

Section 7206—FRAUD AND FALSE STATEMENTS.

Any person who—

(1) DECLARATION UNDER PENALTIES OF PERJURY.—

Willfully makes and subscribes any return, statement, or other document, which contains or is veri-

Appendix C

fied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000.00, or imprisoned not more than 3 years, or both, together with the costs of prosecution.